IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 11TH DECEMBER 2007 / 20TH AGRAHAYANA 1929

CRL.A.No. 8 of 2004

SC.38/2002 OF SESSIONS COURT, KOTTAYAM
CP.21/2002 OF JUDL. MAGISTRATE OF FIRST CLASS, VAIKOM
CRIME NO. 137/1999 OF VELLOOR POLICE STATION.
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APPELLANT: COMPLAINANT.

STATE OF KERALA REP. BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.C.SANTHOSHKUMAR

RESPONDENTS: ACCUSED.
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1. PRAKASAN, S/O.AYYAPPAN, THAYYIL
THATTUPURATHU VEEDU, FROM MANALILVEDU, IRUMPAYAM
KARA, VELLOOR VILLAGE.

2. AYYAPPAN (NO MORE).

BY ADV. SRI.P.RAVINDRA BABU
SRI.SURESH BABU THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

Crl.A.No.8 OF 2004

Dated 11th December, 2007

JUDGMENT

Koshy,J.

A father and his son were charge-sheeted for an offence punishable under Section 302 read with section 34 of the Indian Penal Code. Since father committed suicide, the son (appellant herein) alone faced trial. The allegation was that one John was murdered on 25.11.1999 by the accused. Deceased John and accused are neighbours and close family friends. Sister of the appellant accused one Preethi got married to one Biju. After six months of the marriage, Preethi delivered a full grown child. Both appellant and his father believed that it was the deceased who was responsible for the pregnancy of Preethi, sister of the appellant. In revenge of this the crime was committed. There are no eye witnesses to the incident. Prosecution relied on the circumstantial evidence. The evidence adduced in this case was carefully considered by the trial court and found that prosecution was not able to prove the case against the accused beyond reasonable doubt. Hence, he was acquitted. State filed this appeal against the acquittal. It is settled law that appellate court will not interfere in orders of acquittal unless findings are perverse or patently illegal. Even though appellate court considered the evidence, if the view of the trial court is a possible view, appellate court

will not interfere in the findings even if another view is also possible. In the above circumstances, we shall consider whether reasoning of the trial court in acquitting the accused is based on rational findings. (See **Samghaji Hariba Patil** v. **State of Karnataka** (AIR 2007 SC 28).

2. First we will consider the finding regarding motive. Ext.P7 is the marriage certificate of Preethi which shows that she married Biju on 18.3.1999. Ext.P5 produced by PW15, Administrator of Mercy Hospital, Thalayolaparambu, shows that Preethi had delivered a full grown child on 19.09.1999. PWs 1 and 2 brothers of the deceased deposed that they were told by A1 and A2 that they would do away with John, but, in their statements given to police such allegation was not made. That omission was specifically asked and it was for the first time in court that they come out with a version that Prakasan and Ayyappan had told them that John would be done away with. PW3, a neighbour of the deceased John, also deposed like this, but, he also did not say this version in the statement given to the police. PW9, another witness claimed that he was told by Prakasan at Thalayalam junction that he would kill John, but, there was no reason why Prakasan would say this to PW9. PW14 is the wife of the deceased John. In cross examination she stated that she was definite that John was not responsible for the pregnancy of Preethi. No

evidence was produced to show as to what made Prakasan and Ayyappan to believe that John was responsible for the pregnancy of Preethi. No instances regarding this previous affair were proved. PW14, wife of John has categorically stated that her husband had nothing to do with the pregnancy of Preethi. There is no evidence that earlier also Prakasan and Ayyappan had picked up quarrel with John regarding the matter and the court found that evidence is not strong enough to establish the motive for defence. It is true that proof of motive is not essential for conviction. But, in circumstantial evidence it assumes importance. If there are other strong circumstances, even if motive is not proved, victim can be convicted. But, if the prosecution relies on motive as one of the main links in the chain of circumstances, prosecution has to prove the same as held by the Apex Court in **Ramgopal** v. **State of Maharashtra** (AIR 1972 SC 656).

3. The next circumstance relied on by the prosecution is the presence of Prakasan near the place of incident at about 8 p.m. on the date of incident as deposed by PW7. He is residing at Irumpayam. According to him, he was on his way to his house from Thalayalam junction. When he reached the place of incident, someone lit a torch at him. He also lit his torch and saw the accused. His definite case is that Prakasan did not utter a word to him. In cross

examination he deposed that he could not clearly see the person in the light and he believed it to be Prakasan when on the next day he heard about death of John. In re-examination public prosecutor declared him hostile and cross examination was made, but, nothing could be brought out which is incriminating to the accused. So, the solitary evidence of PW7 to prove the presence of Prakasan near the place of incident at about 8 p.m. failed.

4. The next circumstance relied on by the prosecution is the presence of Ayyappan and Prakasan at about 9 p.m. near the place of incident as seen by PWs 8, 10, 11 and 13. PWs 11 and 13 are brothers. PW8 is a milma booth owner at Irumpayam junction. PW10 is an auto driver. According to PW11, he was standing on the road in front of his house talking to another person on 25.11.1999 at about 9 p.m. PW13, his brother arrived at the place. A short while thereafter, he saw Prakasan coming from the direction of the temple and Prakasan told him that his father is ill. Hearing that PW11 went to fetch a vehicle. By the time he returned with the vehicle, Prakasan was not available at the place and, therefore, he went to Irumpayam junction. He saw PW8 and asked him to accompany him to see if Ayyappan had been taken to any nearby hospital as he had complained of chest pain. Then he and PW8 went to the Government hospital, but, they were not able to find out the location of Ayyappan

and Prakasan. When they returned to Irumpayam junction at about 9.30 p.m. they learnt that John was killed by Prakasan and Ayyappan. In cross examination PW11 deposed that he is not sure whether Prakasan had come from the direction of the temple, but, he is only sure that Prakasan told him of the chest pain of his father. But, PW11 has no case that after returning with the vehicle when he did not find Prakasan he went to the house of Ayyappan to ascertain whether Prakasan and Ayyappan were there, but, he went to Irumpayam junction and along with PW8 he went to the hospital in searching of Ayyappan and Prakasan. PW8 who was running a milma booth stated that at about 9 p.m. on the date of incident he saw Prakasan and Ayyappan coming to the junction from the southern side and mounting an autorickshaw and leaving the place. Soon thereafter, he says that PW11 came with a vehicle and asked him to accompany PW11 to go in search of Ayyappan and Prakasan and they were unable to locate Prakasan and Ayyappan. PW10 is the autorickshaw driver in whose autorickshaw Prakasan and Ayyappan left Irumpayam junction. According to him, they alighted at Thalayolaparambu. Both Prakasan and Ayyappan were not known to him. No identification parade was conducted and the trial court for valid reasons disbelieved PW10. PW13, brother of PW11, deposed that on 25.11.1999 at about 8.45 p.m. he went to meet his brother PW11. When he reached near the house of PW11, he saw PW11 standing near the road in front of his

house and talking with one Thankachan. Thereafter by 9 O' clock, he saw Prakasan and Ayyappan coming from the western side towards east from the direction of the temple. Thereupon Prakasan told him that his father was not well. PW11 left the place to fetch a vehicle. PW13 then says that when Prakasan and Ayyappan came near him, he found a chopper in the hands of Ayyappan and then he asked Prakasan what happened and Prakasan told him that they had finished John. PW13 then claims that he went to the house of PW11 and told the wife of PW11 about the incident. He then immediately went to the place of incident where he found 10 – 15 persons had already gathered at the place. But, he did not inform the matter to the police. In his 161 statement he had a different story. Ext.D1 statement reads as follows:

> "ഞാൻ ചേട്ടനുമായി വർത്തമാനം പറഞ്ഞു നിൽക്കുമ്പോൾ മണലേൽ അയ്യപ്പൻ ചേട്ടൻ രക്തം പറ്റിയ ഒരു വാക്കത്തിയും കൈയിൽ പിടിച്ച് റോഡേ പോകുന്നതു കണ്ടു. അയ്യപ്പൻ ചേട്ടന്റെ പോക്കു കണ്ട് എന്റെ ചേട്ടൻ വിളിച്ചു ചോദിച്ചു എന്താ പറ്റിയത് എന്ന്, ആ സമയം അയ്യപ്പൻ ചേട്ടന്റെ പുറകെ വന്ന മകൻ പ്രകാശൻ പറഞ്ഞു അയ്യപ്പൻ ചേട്ടനു സുഖമില്ല, നെഞ്ചുവേദന ആണെന്ന്."

But, he was silent about the extra-judicial confession in 161 statement

and PW11 did not see chopper with the accused. Extra-judicial confession is a weak piece of evidence and there is no reason for the accused for making confession to PW13. The trial judge considered the evidence of PWs 11 and 13 at paragraph 31 and 32 as follows:

> "31. Coming back to the evidence of PWs.11 and 13, they are the brothers of deceased John. In the evidence of PW11, there is nothing to show that at the time when Prakasan was seen by him, Ayyappan was with Prakasan. If one is to be believe the evidence of PW11, he had only seen Prakasan. There is nothing in his evidence to show the presence of Ayyappan at the relevant time. He is also definite that it is Prakasan who told him that his father was ill and after telling him Prakasan had gone back home. If PW13 is to be believed it is obvious that Prakasan and Ayyappan were returning soon after the incident or in other words, soon after causing the death of John. PW13 claims that he had seen a chopper in the hands of Ayyappan. The investigating officer who had questioned PW11 must have known about the presence of PW13, but surprisingly enough, PW13 was questioned after three months of the date of the incident. Even after knowing that PW11 and PW13 are relatives and the presence of PW13, there is no explanation offered as to why there was considerable delay in recording the statement of PW13. The version given by PW13 to the investigating officer had already been extracted. Apart from the fact that his inconsistent and contradictory versions in Court, his conduct may also be noticed. He goes on the next day to the place of incident and sees people telling the police whatever they knew. If what he claims is true and he would have obviously mentioned the extra judicial confession to the police. Even assuming that he was really under mental agony, he should have approached the police and told them the facts at least a few days after the incident. There is no

> explanation why he did not divulge t to anybody except the wife of PW11 till he was questioned by the police three months after the date of incident.
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> 32. PW13 says that he was able to recognize the persons as Ayyappan and Prakasan as there was sufficient light at the place. One may here re-call the statement of PW13 which is to the effect that at the time when he saw Ayyappan, Ayyappan was carrying a chopper with him. His evidence does not indicate that there was any time lay between the arrival of Prakasan and Ayyappan. In fact, his evidence would show that Ayyappan was following Prakasan. It is rather strange that PW13 alone noticed the presence of Ayyappan with a chopper in his hand and that PW11 did not see Ayyappan at all. The evidence of PW11 does not indicate that Ayyappan was anywhere in the place at the relevant time. The evidence of Pws.11 and 13 are mutually inconsistent and contradictory. Another fact is that PW11 after fetching the vehicle goes directly to Irumpayam junction without going to the house of Prakasan even after knowing that Prakasan had gone back home after telling that Ayyappan was ill. No explanation is offered by this witness as to why he directly went to Irumpayam junction."

Thus, their evidence was disbelieved by the trial judge who had seen the demeanour of the witnesses and we see no ground to disagree with the above reasoning.

5. PW6, another witness stated that on 25.11.1999 at about 9 p.m. he went to meet Rajan whose house was situated near the temple on the northern side. When he reached near the temple, he saw A1 coming from the opposite direction and A1 told him that

“you need not go that way” and he was compelled by A1 to change the direction. At that time, he also saw a chopper in the hands of A2. On the way to Rajan's house he saw blood on the road with the aid of a torch. But, in cross examination he stated that he had directly gone to the house of Rajan and he did not have to pass the temple. Then he stated that first he went to Sangamam Club and then to Rajan's house. He further stated that when he came out of his house, he had no idea to meet Rajan. He entertained the idea of meeting Rajan only after going some distance from his house. PW17 stated that at 8.45 p.m. PW6 came to the club in searching of Rajan. He replied that Rajan was not in the club and PW6 went away. PW17 deposed that PW6 told him that he had met Prakasan and Ayyappan on the way and has narrated what they had told him. Thereafter, he locked the club and went to the house of Rajan. On the way, he also saw blood and a packet lying on the road. He also saw a lit torch lying in the estate and saw a few people gathered in the estate. But, PW6 deposed that he had gone to Sangamam Club before going to Rajan's house. This version appears for the first time when he gives evidence before court. In his statement to the police he stated that he met Prakasan and Ayyappan while going to Rajan's house. Then change was made. If he went to Rajan's house from his house he need not have passed the way near the temple. PW22, Investigating Officer stated that such a statement was not made to him. According to PW22,

description of MOs 13 to 15 and 16 were given by PW6 to the police. But, according to PW6, these articles were seen by him first time in the court after the incident. According to the trial ourt, omission of PW6 stating that he had gone to Sangamam Club and thereafter Rajan's house cannot be a minor omission. PW17 was questioned after two and a half months of the incident and there is no explanation for the delay. When PW6 was questioned, involvement of PW17 was disclosed, but, PW17 was questioned only after two and a half months. The principal witnesses and deceased belong to the same community of converted Christian, whereas the accused was not a converted Christian and it appears that prosecution was able to get manipulated evidence to support the prosecution case. MOs 13 to 15 and 17 are alleged to be the clothes worn by Ayyappan and Prakasan on the date of incident. These items are claimed to have been recovered based on the confession statement given by Prakasan as per Ext.P6 seizure mahazar. PW16 is the recovery witness. He too belongs to the same community like other witness. He, of course, deposed about the recovery of MOs 13 to 15 and 17. He says that accused were brought to the house of accused and he had seen Prakasan taking out these articles near a kayyala in their property. Further, MO17 chopper was recovered on the basis of the confession statement of A1. PW13 is categoric that when he had seen Ayyappan and Prakasan, Ayyappan had a chopper with him which is MO16. The

other chopper which is smaller in size was recovered from the place of incident. PW8 milma booth owner, who has seen Ayyappan and Prakasan mounting an auto, had no case that Ayyappan was carrying a chopper with him. PW10, the auto driver, had no case that when the two persons mounted his auto from Irumpayam junction, anyone of them was carrying a chopper. Therefore, witnesses are not stating the correct facts. There is no evidence to show that from the place where PW13 had seen Prakasan and Ayyappan and to the place where Ayyappan and Prakasan said to have mounted in the auto, they had to pass through the place where MO16 was concealed. Further, PW13 had no necessity to go near the place where chopper was found. These evidences will not show that the only hypothesis possible is that the deceased was killed by A1 and A2.

6. In the absence of direct evidence, for convicting an accused on the basis of circumstantial evidence, it should be proved leaving no doubt that the only conclusion possible from circumstances is that the accused alone is guilty and nobody else is guilty. Mere suspicious circumstances alone is not enough to convict a person under section 302 IPC. It is true that commission of offence can be proved by circumstantial evidence. But as held by the Apex Court in **Balwinder Singh** v. **State of Punjab** (AIR 1996 SC 607) in a case based on circumstantial evidence the court has to be on its guard to avoid the

danger of being swayed by emotional considerations. For convicting the accused generally on the basis of circumstantial evidence, court should be satisfied that all the links in the chain are complete and the only hypothesis possible on the basis of the evidence adduced is that accused and the accused alone is guilty of the offence. (**See C.K.Raveendran** v. **State of Kerala** (JT 1999 (9) SC 408) and **Jaswant Singh** v. **State (Delhi Admn)** (AIR 1979 SC 190). Circumstantial evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence as held by the Apex Court in **Mangaleshwari** v. **State of Bihar** (AIR 1954 SC 715)**.** It has been repeatedly held by the Supreme Court that the distinction between 'may be true' and 'must be true' is long and divides vague conjectures from sure consideration and each link must be established by clear and un-objecting circumstances. In **State of Kerala** v. **Ramachandran** (1999 (3) KLT 512), Chief Justice Arijit Pasayat (as he then was) observed for the Bench as follows:

> It is settled principle of law that the circumstances relied upon by the prosecution must be fully established, and the chain of evidence furnished by those circumstances should be fully complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence not only various links of evidence should clearly establish guilt of the accused, but also it must be such as to rule out a reasonable likelihood of the innocence of the accused."

The Apex Court in **Sharad** v. **State of Maharashtra** (AIR 1984 SC 1622) prescribed five principles for convicting an accused on the basis of circumstantial evidence which are as follows:

> 1. the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.
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> 2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
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> 3. the circumstances should be of a conclusive nature.
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> 4. they should exclude every possible hypothesis except the one to be proved; and
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> 5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

It is well settled principle that unlike direct evidence, circumstances which throw light, should lead from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture

into a conviction. In this case, such consistent conclusive circumstances are absent. In any event, the view of the trial court that prosecution was not able to prove the case beyond reasonable doubt is a possible view. Hence, we see no ground to interfere with the order of acquittal.

The appeal is dismissed.

J.B.KOSHY
JUDGE

K.HEMA
JUDGE

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